

EEOC Proposes Update to its Compliance Manual on Religious Discrimination and Accommodation

Labor & Employment Law Update

By John Hayes on December 14, 2020

On November 17, 2020, the Equal Opportunity Commission (EEOC) proposed an update to its Compliance Manual's section on Religious Discrimination. The proposed Manual is open for public comment until December 17, 2020, after which the EEOC will take those comments into consideration before publishing the finalized updated Compliance Manual.

The EEOC Compliance Manual is not binding and has no force of law. Nonetheless, employers should take note of the Manual as it provides insight on how the EEOC may consider charges alleging religious discrimination claims in the future, as well as the EEOC's best practices for employers.

The proposed changes do not change any existing obligations under Title VII. However, the proposed update reflects the EEOC Chair's emphasis on religious discrimination and accommodation and a more expansive view of exemptions for religious employers under Title VII based upon a number of cases, including U.S. Supreme Court cases, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719 (2018), and *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 679 (2019).

The new proposed guidance focuses on four areas:

- Definitions and Coverage – what constitutes a religion, the religious organization exemption, and the ministerial exception;
- Employment decisions based on religion, including recruiting, hiring, promotion, discipline, compensation, religious expression within the workplace, customer preference, security requirements, and bona fide occupational qualifications;
- Religious Discrimination, Harassment, and hostile work environment issues; and
- Religious reasonable accommodation issues.

While it's impossible to condense the 114 page proposed EEOC Guidance down to a short blog, here are a few points for employers to take note:

Coverage – Religious Beliefs

The EEOC defines “religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” The Supreme Court has made it clear that it is not a court’s role to determine the reasonableness of an individual’s religious beliefs. An employee’s belief, observance, or practice can be “religious” under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual’s belief, observance, or practice, or if few – or no – other people adhere to it.

The EEOC notes that courts have generally resolved doubts about particular beliefs in favor of finding that they are religious beliefs, but that social, political and economic philosophies or personal preferences are not religious beliefs under Title VII.

Exemption for Religious Organizations

Religious corporations, associations, educational institutions, and societies are exempt from Title VII and are permitted to give employment preference to members of its own religion – and discriminate against employees or applicants because of their religion. “Religious institutions” does not just cover churches, but can include religious schools, hospitals, charities and social organizations, and engaging in secular activities does not disqualify an organization.

The EEOC and courts evaluation of whether an organization is a religious institution is a case-by-case analysis considering a number of factors, with no one factor being dispositive. Those factors include, but are not limited to:

1. Is it organized for and primarily engaged in carrying out that religious purpose?
2. Does it hold itself out as having a religious purpose?
3. Is it for profit or nonprofit?
4. Does it produce a secular product?
5. Do its articles of incorporation state a religious purpose?
6. Is it owned, affiliated or supported by a religious entity?
7. Does it regularly include prayer or other forms of worship in its activities?
8. Is religious instruction in its curriculum, to the extent it is an educational institution?

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The guidance recognizes the recent court decisions that have expanded the exemption for religious institutions under Title VII and protections under the First Amendment and Religious Freedom Restoration Act.

Reasonable Accommodations

Title VII requires employers to provide reasonable accommodations based on religion. Common reasonable accommodations include: (1) flexible scheduling for religious practices (e.g. breaks for prayers or days off for religious holidays); (2) voluntary substitutes or swaps of shifts and assignments; (3) lateral transfers or changes in job assignment (such as a restaurant server being excused from singing happy birthday, and pharmacist excused from providing contraceptives); and (4) modifying workplace practices, policies, or procedures (such as dress and grooming policies).

Undue Hardship

Whether a requested accommodation is an undue hardship is also a case-by-case analysis. The EEOC states that relevant factors may include, “the type of workplace, nature of the employee’s duties, the identifiable cost in relation to the size and operating costs of the employer and the number of individuals who will in fact need a particular accommodation.” The EEOC further goes on to state that “to prove an undue hardship, the employer will need to demonstrate how much cost or disruption” will be involved and that it is not *de minimis*.

In addressing requested accommodations, the EEOC further states that employers cannot rely upon hypothetical hardships, rather than objective information. For example, the EEOC states that accommodating an employee by not requiring them to wear a LGBTQ shirt is reasonable, but an employer may require the employee to attend anti-discrimination and harassment training that discusses the prohibition on sexual orientation discrimination.

In discussing requests for accommodations, employers should engage in an interactive dialogue. The EEOC also provides that this may include balancing an employee’s religious practice with other employees’ religious practices or right to not have religious beliefs imposed on them.

The update signals that the EEOC proposes to apply a more stringent test for an employer to establish that an employee’s requested religious accommodation is an undue burden.

Employers should continue to monitor any ultimate changes to the EEOC guidance and consult with legal counsel to ensure compliance with the laws.

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In the mean time, it is important for employers to review their policies to make sure that they cover religious discrimination and reasonable accommodations. Employers should remind supervisors and managers of the obligation to provide religious based accommodations, the process and how to avoid or limit discrimination or harassment based on religion (especially when an accommodation is provided).

Finally, it is important for employers to recognize that religious accommodations are not always apparent. For example, mandatory vaccination policies can implicate religious beliefs and result in accommodation requests that employers will have to review.

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